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September 27, 2004

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SEP 27 2004

Federal Communications Commission
Office of Secretary

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Petition of Mid-Rivers Telephone Cooperative to be Declared an ILEC Pursuant to Section 251(h)(2) of the Communications Act, WC Docket No. 02-78

Ex Parte Letter

Dear Ms. Dortch:

In February 2002, Mid-Rivers Telephone Cooperative, Inc. ("Mid-Rivers") filed its Petition pursuant to Section 251(h)(2) of the Communications Act and Section 51.223(b) of the Commission's rules requesting that the Commission "adopt a rule and a declaration that it is now the Incumbent Local Exchange Carrier in Terry, Montana." A Public Notice requesting comments on the Petition was released in April, 2002. Comments were timely filed and there were subsequent *ex parte* filings, but no action has been taken. In May of 2004 Mid-Rivers asked the U.S. Court of Appeals for the District of Columbia Circuit to issue a Writ of Mandamus compelling the Commission to act on the Petition. The Commission's General Counsel responded in August 2004, to which Mid-Rivers filed a Reply.[1]

The General Counsel's response to the Court stated that the Commission is considering whether to adopt a Notice of Proposed Rulemaking ("NPRM") which would request another round of comments before action could be taken on Mid-Rivers' Petition. Mid-Rivers' reply to the Court argued that a rulemaking meeting the requirements of the Administrative Procedure Act ("APA") did not appear to be required because the order adopting Section 51.223(b) of the Commission's rules and

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[1] The Reply demonstrated that the issues allegedly requiring a duplicate round of comment were not, in fact, substantial, and that grant of the petition would not have a significant national impact. A copy of the reply is attached.

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the text of the rule, did not contemplate further company by company rulemakings. However, even if the Commission's procedure does not satisfy the APA and individual rulemakings are required, the notice and comment proceeding conducted in 2002 satisfied the APA even though it was not published in the Federal Register, because the potentially affected parties had actual notice of what was proposed, and the apparent issuance of the notice by the Bureau instead of the Commission should be considered harmless error under Section 706 of the APA.

There is apparently a concern however, that the court's decision in *Sprint v. FCC*, 315 F.3d 369 (D.C. Cir. 2003) precludes the Commission from adopting a rule where it has not labeled its notice an NPRM or published in the Federal Register. The facts of the case, and the issues addressed by the court are, however, substantially different from those presented in this proceeding. Therefore, as explained below, *Sprint* does preclude the Commission from deciding that all APA requirements have been met and that it may issue a declaration and rule resolving Mid-Rivers' Petition.

Sprint involved changes the Commission made to its rules regarding compensation of payphone providers where a new NPRM was not issued after adoption of the initial rules. The Court rejected the argument that the change was only a clarification for which APA notice was not required and rejected several other theories as to why a new NPRM was not required.

Most relevant to the Mid-Rivers Petition, the Court in *Sprint* rejected the Commission's argument that Sprint had actual notice from the public notice published by the Bureau.[2] The Court stated that because the Bureau does not have authority to issue NPRMs, Sprint would not have been on notice that the Commission would undertake to adopt a new rule. The Court noted that the comments submitted in response to the notice demonstrated that the parties did not appreciate that the Commission was contemplating substantial changes in the rules and there was no hint of such change in the Bureau's notice.

The Court also rejected the Commission's argument that it should take account of the prejudicial error rule pursuant to Section 706 of the APA, because it concluded that the failure to comply with the APA was not harmless because there was uncertainty as to the effect of that failure. The Court noted that Sprint could have been prejudiced by being misled into believing that a clarification instead of a new rule was contemplated, and would have more thoroughly presented its arguments if it had understood that a rulemaking was involved. For these and other reasons the Court concluded the effect of the procedural errors was uncertain. The Court's concerns in *Sprint* are not implicated by the Mid-Rivers Petition. The problem in *Sprint* was that the combination of procedural error with inadequate substance in the notice. Because the notice in this case was explicit as to what action was contemplated, the case presents only a question of whether there was procedural error

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[2] The Court also did not accept the Commission's argument that the changed rule was a reconsideration on its own motion which the rules permit within 30 days of public notice of an action, the time for which was tolled by pending petitions for reconsideration. Nor did the Court accept the argument that a new NPRM was not required for the reinstatement of a rule, because the new rule was substantially changed from the original. Second, the Court rejected the argument that the new rule was a "logical outgrowth" of the previous rule because there was no notice of the proposal. Because these types of issues are not raised by the Mid-Rivers Petition, this portion of the decision is not relevant.

because the notice was issued by the Bureau and not filed in the Federal Register, and if so, was the error harmless.

The Public Notice identified the Terry, Montana exchange by name, so that there can be no question that Qwest, the "person" most "subject," as well as other interested parties such as Western Wireless, were "fairly appraised" that declaring Mid-Rivers to be an ILEC in Qwest's exchange was the subject of the Petition. The Mid-Rivers Petition, referring to the wording of Section 251(h)(2) specifically asked for a "rule" designating it an ILEC in Terry. Neither the lack of authority of the Bureau to issue NPRMs nor any lack of explicit statement of the issue misled any interested parties. The comments filed, including the late filed comments of Qwest, show that the parties fully understood what was being contemplated even if the notice was not labeled an NPRM, and had every incentive to make their best arguments. Because there is no valid concern with the substantive content of the notice, and the affected parties actually received it, Federal Register publication was not required.[3] But even if publication were required, or the Bureau exceeded its authority in issuing the notice, any error was harmless because no party was prejudiced.

While the other parties have not been prejudiced, Mid-Rivers has suffered substantial harm by the Commission's failure to act on its petition in a reasonable time. Mid-Rivers would have had no objection in the spring of 2002 had the Commission then characterized its Petition as a request for an NPRM. Now that nearly thirty two months have gone by since the Petition was filed, and any requirements of the APA have been met, the Commission should proceed to issue a declaration and rule.

Please direct any questions regarding this matter to me.

Sincerely yours,

/s/ David Cosson

Counsel to Mid-Rivers Telephone Cooperative, Inc.

cc: Chairman Powell
Commissioner Abernathy
Commissioner Copps
Commissioner Martin
Commission Adelstein
Christopher Libertelli
Matthew Brill

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[3] On September 3, 2004, the Bureau issued a Public Notice asking for comments on another Section 251(h)(2) without designating the Notice as an NPRM or indicating that it would be published in the Federal Register. Pleading Cycle Established for Comments on Petition for Order Declaring South Slope Incumbent Local Exchange Carrier in Iowa Exchanges of Oxford, Tiffin, and Solon, WC Doc. No. 04-347, DA 04-2871, Sep. 3, 2004.

Jessica Rosenworcel
Daniel Gonzalez
Scott Bergmann
Jeff Carlisle
Ian Dillner

Attachment

In the
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

In re	)	
	)	
Mid-Rivers Telephone Cooperative, Inc.	)	No. 04-1163
Petitioner	)	

REPLY OF MID-RIVERS TELEPHONE COOPERATIVE, INC. TO FCC OPPOSITION

I The FCC Justification for its Two and One Half Years' Delay Significantly Overstates the Novelty, Complexity and Difficulty of the Issues

In its Opposition to the Petition for a Writ of Mandamus filed by Mid-Rivers Telephone Cooperative, Inc. ("Mid-Rivers"), the Federal Communications Commission ("FCC") attempts to justify its delay in responding to a petition filed with it by Mid-Rivers in February 2002 on the grounds that the issues raised by Mid-Rivers' Petition are "novel and complex, and potentially far reaching...." The FCC contends that it could not resolve the petition sooner because it has devoted its "limited" resources to other matters, some of which involve statutory deadlines. For the reasons described below, the FCC's claims of novelty, complexity and potential impact are vastly overstated, and do not justify its failure to comply with the command of the Administrative Procedure Act to conclude a matter presented to it in a reasonable time. 5 U.S.C. 555(B).[1]

[1] Although this Reply necessarily addresses the substantive issues relevant to the merits of Mid-River's Petition before the FCC, Mid-Rivers recognizes that these questions are not now before the court, *per se*, but some discussion of them is required to respond to the FCC's claims and establish that the FCC's delay in resolving the issues is unreasonable.

A. An unreasonable delay in concluding a question of first impression is still unreasonable.

The FCC's assertion that its delay in acting on Mid-River's petition is reasonable given the novelty of the issue presented is not well taken. Section 251(h)(2) on its face provides straightforward criteria and ample evidence that Congress anticipated there would be situations where competitive local exchange carriers ("CLECs") would be so successful in a market that they would have all of the characteristics of an incumbent, and so should have the obligations of an incumbent to interconnect with other competitors. In 1996 the Commission proposed and subsequently adopted a specific rule, 47 C.F.R. 51.223(B), to implement Section 251(h)(2) of the Act.[2] Where six years later Commission was presented with a petition under that rule involving a competitive carrier which has become dominant in the area and has supplanted the incumbent, it is unreasonable to claim the issue is so new that it needs another two and one half years just to think about how to ask for a second round of comments on the same application, which will probably add another year until a decision is issued.[3]

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[2] "A state commission, or any other interested party, may request that the Commission issue an order declaring that a particular LEC be treated as an incumbent LEC, or that a class or category of LECs be treated as incumbent LECs...." As discussed in II, below, neither the rule nor the order adopting it gave any indication that additional rulemaking would be required in individual cases. The FCC stated on adopting Section 51.223: "...[W]e will permit interested parties to ask the FCC to issue an order declaring a particular LEC or a class or category of LECs to be treated as incumbent LECs." *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16110 (1996).

[3] The *Guam Telephone Utils. Comm'n* proceeding involved an incumbent telephone company which did not meet the criteria for incumbent telephone company status under the 1996 amendments to the Communications Act. *See,* FCC Opposition at n. 6. Two petitions involving facts similar to Mid-Rivers' were withdrawn before any FCC Action.

The Commission claims, however, to be perplexed by a petition by a CLEC asking to have incumbent local exchange carrier obligations applied to it. The FCC purports to find a distinction in its one previous 251(h)(2) decision in a proceding initiated by the Guam Public Utilities Commission ("PUC") with respect to the Guam Telephone Authority ("GTA"). As the record in that proceeding makes clear, however, both the PUC and GTA are components of the territorial government.[4] In addition, the Commission's decision designating GTA made a specific point of the fact that GTA asked to be designated an incumbent in its comments. There is thus no basis for this perplexity.

Despite the FCC expectation that other parties would petition to have CLECs declared ILECs, Mid-Rivers' Petition made no secret of its reasons for asking to be declared the *de jure* incumbent where it is the *de facto* incumbent. The Petition stated explicitly:

> Upon grant of this petition, Mid-Rivers will promptly file a petition for waiver of the frozen study area rules and execute such other documents as are necessary to incorporate the Terry exchange into its ILEC study area and the NECA tariff. Petition at 3.

The Commission must have understood this statement to mean that Mid-Rivers' request was intended to lay the basis for establishing that the interstate access service it provides in Terry will be subject to the same regulation and participation in the NECA pools as Mid-Rivers' other 11,000 incumbent access lines.[5] If this point was somehow missed by the Commission in the

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4 *Guam Public Utils. Comm'n*, 12 FCC Rcd 6925, 6930-31 (1998).

5 Although Mid-Rivers operations in Terry appear to meet the tests previously established to become a member of NECA, because 47 C.F.R. 61.26 limits interstate access rates charges by CLECs to levels below those allowed to ILECs, Mid-Rivers can not participate in the NECA pools with respect to its CLEC traffic because the pooling process necessarily requires use of a uniform rate structure by all members. *See, The Offshore Telephone Company Request to Participate in the National Exchange Carrier Association, Inc.*, 3 FCC Rcd 4513 (1988) *aff'd per curiam sub nom.* Offshore Telephone Co. v. FCC, 873 F.2d 408 (D.C. Cir. 1989).

Petition, Mid-Rivers held multiple meetings with FCC personnel urging action on its Petition and offering to address any issue of concern.[6] Mid-Rivers thus made clear to the Commission that, among other reasons for its petition, it was willing to trade the expanded interconnection obligations of Section 251(c) for the ability to provide interstate access in Terry under the same regulatory scheme as is applicable to Mid-Rivers' ILEC exchanges so that it could adopt cost-based access charges, which the CLEC rules do not permit.

Thus in addition to the actual harm Mid-Rivers has suffered as a general result of the failure of the Commission to resolve the matter presented in a reasonable time as required by the APA, and the resultant uncertainty as to its status, Mid-Rivers has suffered particular harm because it has not been able to participate in the NECA tariff and pooling process for this extended period.

The FCC also finds a basis for its long period of contemplation in Qwest's late filed argument that Mid-Rivers should be designated as the incumbent for the entire area in which it competes with Qwest, rather than just the Terry exchange.[7] This Qwest proposal provides no basis for years of delay to evaluate because it is inconsistent with the statute's provision that designation may be made for "an area," which most logically implies that the petitioner may propose a specified area. It is also apparent that the area must meet the very specific criteria of

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6 *See,* Petition, Appendix 3

7 Letter from Craig Brown, Qwest to Marlene H. Dortch, Secretary, FCC, June 28, 2002 at 2 ("Brown Letter"). The FCC Public Notice (Mandamus Petition, App. 2) required comments to be filed by May 6, 2002 and replies by May 15, 2002. The initial Qwest substantive comments on which the Commission's Opposition relies, were thus filed more than six weeks out of time without so much as a nod toward making an excuse or requesting permission, but are apparently given full credence by the FCC.

the Act that the carrier occupy a position similar to the incumbent and that it *substantially* replace the incumbent.

The FCC makes no claims that any other area served by Mid-Rivers meets these tests, nor has any interested party come to the Commission and filed its own 251(h)(2) petition in the two and one half years since Mid-Rivers filed for Terry. Qwest raised the issue in its late filed comments, but provided no facts and did not file its own petition. Given that there is nothing on the record indicating other areas are similarly situated, and the ability of any interested party to file its own petition, the area in question is neither so novel or complex that two and one half years (plus an additional 6 years from the adoption of the Act to the filing of the petition) are reasonably needed to make a decision. If the FCC or Qwest or any other party believes that Section 251(h)(2) petitioners should always be required to include all of a carrier's area of operation that meet the criteria, they are free to petition the Commission to amend Section 51.233 to include such a requirement, but that is not the rule now.There is thus no basis for the FCC to delay action on a petition while it thinks about a party's suggestion that it should inquire as to whether there is really an issue.

B. The FCC Overstates the Potential Impacts of granting Mid-River's Petition

The FCC claims that comments it received indicate that its decision could have national significance. Opposition, p. 10. Of course the first decision on a given issue will often have some precedential effect, but the implication of the Commission's statement that such a precedent will "inform business and regulatory decisions by and concerning LECs throughout the nation" is that substantial numbers of carriers or subscribers will be effected. The record and the Commission's knowledge of the industry (which it is required to have, 47 U.S.C. 218) do not

support any such implication. The statement of the Rural Independent Competitive Alliance ("RICA"), of which Mid-Rivers is a member, that several other rural CLECs are similarly situated hardly creates a nation wide impact. The Commission is well aware that all of the approximately 80 RICA members are small CLECs with a few thousand subscribers, and the statement, as well as subsequent discussions indicates that only "several" members were considering similar petitions (two and one half years later, only one has been filed).

The FCC also says it cannot follow Mid-River's suggestion that it defer difficult issues to subsequent proceedings because it must find that grant of the petition will be in the public interest. It is true that it must find ILEC designation to be in the public interest, but it is entirely unreasonable to suggest that no decision can be made because there are unresolved issues such as eligibility for Universal Service Support.[8] As this Court is well aware, the Commission has been intensely involved in trying to achieve a balance between promoting competition and maintaining regulatory control over at least parts of the industry and that this effort will likely never be finished. Mid-Rivers made clear that it recognizes that many rules may change as the industry evolves, but believes it is entitled to a decision based on the current rules, and in any event offered to accept a condition to its designation that it continue to receive Universal Service Support on its current basis, until the FCC revises the USF rules.

Assuming, *arguendo,* that designating Mid-Rivers as an ILEC in Terry did have the automatic effect of increasing Mid-Rivers USF support, the amount of increase would have only

[8] The FCC's description (Opposition at 3) of the USF as a "federal fund" is more accurately described as a federally *regulated* fund. And while it is correct that ETC status (which Mid-Rivers has) rather than ILEC status is the criterion for eligibility to receive support, ILEC and CLEC support are determined under different rules.

a *de minimis* effect on the fund. Neither the FCC, nor the comments it relies on provide any quantification of their claim that the Commission must investigate the implications of an increase in support to Mid-Rivers. Mid-Rivers does not quarrel with the point that the Commission might want to consider the USF impact, or that it could assume a "worst case" scenario in which Mid-Rivers' support in Terry increased to the level of its other ILEC lines. Such an inquiry should take the FCC five minutes, or perhaps even ten by examining three reports submitted to it quarterly by the Universal Service Administrative Company ("USAC").[9]

The FCC procedures applicable to study area waivers define an adverse impact on the USF as an increase in the total high cost support fund for the year of one percent or more.[10] The current annual high cost fund is estimated by USAC at more than $3.7 billion, one percent of which is approximately $37 million. Mid-Rivers' ILEC monthly support is $50.35 per line. (USAC HC01 p. 19, HC05, p. 17) In the Terry exchange, Mid-Rivers, as a CLEC, receives the same per line support as Qwest or $38.75 per line (HC15, p.41). Thus, if the Commission granted Mid-Rivers' petition and insisted it receive support at its ILEC level (despite Mid-Rivers' offer to forego the increase), the annual increased burden on the USF would be less than $60,000, or less than 0.002 percent.[11]

The point of the foregoing is not to involve the Court in evaluation of potential changes in USF, but to illustrate the unreasonableness of the FCC's position that parties such as Qwest

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[9] USAC High Cost Support Projections are available at http://www.universalservice.org. For the fourth quarter of 2004 the relevant appendices are HC01, HC05 and HC15.

[10] *U S West Communications, Inc. and Eagle Telecommunications, Inc., Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's Rules,* Memorandum Opinion and Order, 10 FCC Rcd 1771, 1774 (1995).

[11] ($50.35 - $38.75) X 422 lines X 12 months)/$3,799,000,000. These calculations use USAC fourth quarter 2004 estimates.

have raised issues of complexity and national impact that require prolonged evaluation. The USF impact analysis is simple arithmetic, not rocket science, and the impact if even 50 more similar petitions were granted would still be way below anything the Commission finds significant.

As another reason it can't make up its mind what to do with the Petition, the FCC cites the comment of Western Wireless that it may be more difficult for competitors to enter the Terry exchange if the incumbent is a rural telephone company not subject to Section 251(c) interconnection requirements.[12] Opposition at 4,10. When Congress adopted Section 251(h)(2), as an integral component of its plan to open the local exchange networks to competition, it necessarily recognized that it is more likely that competitors would substantially replace the incumbent in smaller rather than larger towns, and that the new incumbent could well be a rural telephone company, Congress also decided that rural telephone companies would not be subject to 251(c) unless and until there is a bona fide request for interconnection and a state commission has removed the exemption pursuant to Section 251(f). The FCC cannot reasonably say it needs years and years to contemplate whether it should grant a change in status when the factual circumstances precisely match that contemplated by Congress, merely because the carrier will potentially be subject to some different rules.

Even assuming that there are cases where the FCC should endlessly evaluate factors and schedule duplicate rounds of comments years apart to assure itself that there is no threat to

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[12] The FCC also notes Mid-Rivers' alleged failure to state whether it will take advantage of the Section 251(f) exemption, but nothing in that section or the FCC's implementing rules contemplates that an ILEC has any duty whatsoever, unless and until it receives a *bona fide* request for interconnection. The FCC therefore cannot cite Mid-Rivers failure to speculate how it might react to a hypothetical interconnection request because that reaction will necessarily depend on the facts and circumstances at the time.

competition, it cannot reasonably make Terry Montana the poster child for these concerns. The 600 or so souls in Terry are a mere 180 mile drive from Billings, the closest metropolitan area in Montana, and only 225 miles from Bismark, North Dakota. In the seven years Mid-Rivers has been competing in Montana, no other competitor has sought entry. In short there is no reasonable basis to think some entrepreneur' dreams could be thwarted.

If there were other competitors who needed Section 251(c) interconnection, their lot would be improved if Mid-Rivers were designated the ILEC. Today, Qwest has Section 251(c) interconnection obligations, but only 3% of the subscribers; Mid-Rivers, as a CLEC is not subject to Section 251(c) and has 97% of the subscribers. If Mid-Rivers is named the ILEC, a competitor can make a bona fide request for interconnection whereupon the state commission makes a determination pursuant to Section 251(f) whether or not to terminate the incumbent's exemption.

The Commission dealt with this very issue in the *Guam* proceeding in which it concluded that the public interest would be served by designating GTA as an incumbent because it could become subject to Section 251(c):

> Construing section 251(h)(2)(B) to foreclose the possibility of classifying GTA as an incumbent LEC would thwart [the 251(f)] procedure, substituting a permanent exemption for the potentially temporary exemption expressly set forth in section 251(f).[13]

Having concluded in the only case to address the issue that there is a net public interest benefit through increased opportunity for competition if it declares the dominant local exchange carrier to be an "incumbent," the Commission cannot stand before this Court and reasonably

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13 *Guam Public Utils. Comm'n*, 12 FCC Rcd at 6946 (para. 35).

claim that it needs years and years to evaluate the significance to other parties of declaring Mid-Rivers subject to Section 251(c) in Terry, Montana. The Commission points to no change in circumstance between its 1998 *Guam* proceeding and Mid-Rivers' 2002 Petition.

Similarly, the Commission cites to Western Wireless and Qwest's concern that another carrier seeking ETC designation for Terry might be required to serve the entire Mid-Rivers ILEC study area. Opposition at 4 Again, the concern is hypothetical since there are no such requests, and again, like the Section 251(c) exemption, the Act provides a remedy by specifying that the FCC and the State Commission may determine that the second ETC may be designated for a lesser area than the study area of the rural telephone company with which it competes. 47 U.S.C. 214(e)(5), 47 C.F.R. 54.207. It is therefore unreasonable for the Commission to plead that it must agonize for years over whether a competitor should be eligible for USF based on Mid-Rivers costs, while serving only a portion of Mid-Rivers study area, when straightforward procedures exist to ameliorate the requirement in meritorious cases, and the Commission is well familiar with those procedures, having used them many times.[14]

II IT IS UNREASONABLE AND UNNECESSARY FOR THE FCC TO FURTHER DELAY ACTION ON THE PETITION BY NOW ISSUING AN NPRM

The FCC asserts that it is now "poised to take action" on Mid-Rivers' Petition and that a Notice of Proposed Rule Making (NPRM) is being circulated to the Commissioners.[15]

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[14] *See, e.g., RCC Holdings, Inc. Petition for Designation as an Eligible Telecommunications Carrier Throughout its Licensed Service Area in the State of Alabama,* 17 FCC Rcd 23532 (Wireline Comp. Bur., 2002), *Cellular South License, Inc. Petition for Designation as an Eligible Telecommunications Carrier Throughout its Licensed Service Area in the State of Alabama,* 17 FCC Rcd 23493 (Wireline Comp. Bur. 2002)..

[15] Two weeks after the FCC Opposition was filed, no notice has been released by the FCC. However, while the NPRM was allegedly being voted on, *ex parte* meetings were conducted

Opposition at 13 Allegedly this NPRM will enable the Commission to inform the public of the issues raised by the Petition and solicit comment from parties "that might not have direct involvement in the provision of service in Terry, Montana." Interestingly, the FCC does not: claim that it is required to issue an NPRM by the Act or the APA; provide any explanation as to why its May 2002 public notice was inadequate to solicit comments; identify any potential party that did not comment in 2002; and most significantly for the purposes of evaluating its compliance with the APA requirement to conclude a matter within a reasonable time, provide any explanation why it could not have characterized its initial request for comments as an NPRM or sought further comment during 2002 if it was not satisfied with the initial comments filed pursuant to that notice and the late-filed comments of Qwest.

The FCC's Opposition does not state why the Commission believes it must now call for another round of comments under the guise of an NPRM. The statute does provide that determinations under Section 251(h)(2) are to be made "by rule" and Mid-Rivers' Petition requested the Commission "issue an order and rule." Petition 1, 4. In the 1998 *Guam* proceeding, the Commission did issue an NPRM, but did so without discussion of why an NPRM was required given its rule which requires only a request for an order. In light of these contradictory signals, it is perhaps legitimate to ask whether, no matter how belated, the apparent decision to now proceed by NPRM is required. Because, as described below all legal requirements for adoption of a "rule" under Section 251(h)(2) have been met, there is no

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with three Commissioners' offices by a carrier repeating the arguments in the FCC Opposition. Letter from Karen Brinkmann to Marlene Dortch, Secretary, FCC, Aug. 20, 2004. A copy is provided in Appendix A.

justification for a duplicative proceeding under a slightly revised nomenclature, and the FCC insistence on replicating its 2002 notice and comment cycle are unreasonable.

If the statute is taken to mean that before designating any carrier as an incumbent under Section 251(h)(2) the FCC must adopt a rule of general applicability under the procedures specified in 5 U.S.C. 553(b), including publication of notice in the Federal Register, the FCC conducted such a proceeding in 1996 and adopted what is now 47 C.F.R. 51.223(b). 11 FCC Rcd 15499, 16110 (1996). The APA also contemplates that a rule may have particular applicability, 5 U.S.C. 551(4), but where the "persons subject" to the rule have actual notice of the proposed rule, then general notice is not required to be published in the Federal Register. 5 U.S.C. 553(a)(2). The FCC procedural rules are consistent. 47 C.F.R. 1.412(a)(3).

Here, the proposed "rule" would directly affect Mid-Rivers and possibly Qwest. The public notice, although not published in the Federal Register, identified the Terry exchange as the subject of the petition, which provided Qwest with actual knowledge that the Commission was considering a rule involving it. Other parties, such as Western Wireless, which claimed to have an interest in possibly competing in Terry also had actual notice and so were "fairly appraised" that the Commission might designate Mid-Rivers as the incumbent in Terry, as well as any "logical outgrowths" from such a decision.[16]

In this situation where fully adequate notice and comment have occurred and all parties have had opportunity to speak, the FCC has provided no justification for waiting two and one

[16] The Public Notice did not state explicitly that it was issued "by the Commission" and the contact listed was a Wireline Competition Bureau staff member. The Commission has previously found, however, following the dictates of 5 U.S.C. 706 that issuance of rulemaking notices by a Bureau, even if not within its authority, is harmless error. *Petition of City of Richardson*, 16 FCC Rcd 18982, 18990 (2001).

half years, and then initiating a duplicate round of notice and comment which will inevitably delay a final decision for perhaps another year.[17] It is also unreasonable and an abuse of discretion to rely on late filed comments where there was not even a request by Qwest that is failure to timely file be excused.

III CONCLUSION

The Administrative Procedure Act unquestionably provides agencies with broad discretion to determine the normal progression of their proceedings and to prioritize its workload. At some point however, an agency's abuse of this discretion amounts to a failure to conclude a matter presented in a reasonable time. In this case there is no justification for the FCC's unreasonable delay or its claims that the contentions of parties made during and after a full notice and comment period compel it to conduct a second, duplicate comment cycle. Each of the so-called public interest concerns raised in the Opposition are shown above to be insignificant, easily resolvable, or, in the case of competitive opportunity, to actually benefit competitors. Nor does the FCC provide any justification for duplicating the comment cycle when all procedural requirements to adopt the kind of rule at issue here have been met and the record shows that Mid-Rivers' Petition meets the criteria of the Act. Finally, even if there is some room for the "we have been to busy with issues more important than yours" argument, the two and a half years of inaction ultimately fail to comply with the APA requirement.

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[17] Given the somewhat unusual choice of wording by Congress, Mid-Rivers is not suggesting that the FCC does not have discretion to proceed with an NPRM in Section 251(h)(2) proceedings, but only that where its rule does not require or even suggest that such procedure will be used, and where there was actual notice to affected parties, the notice and comment procedure actually employed satisfies any requirements of 5 U.S.C. 553.

Mid-Rivers respectfully renews its requests that the Court issue a Writ of Mandamus compelling the Commission to grant or deny Mid-Rivers' Petition within thirty days.

Respectfully submitted

Mid-Rivers Telephone Cooperative, Inc.

By _____
David Cosson
Its Attorney

Kraskin, Moorman & Cosson, LLC
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August 25, 2004